

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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DAVID RICHARD LEE, )  
Plaintiff, )  
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 )  
v. ) Case No. 12-2529-JTF/dkv  
 )  
DOUGLAS H. SHULMAN, )  
Commissioner, )  
Internal Revenue Service, )  
 )  
Defendant. )

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ORDER ADOPTING REPORT AND RECOMMENDATION

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Before the Court is the Report and Recommendation of Magistrate Judge Diane K. Vescovo, DE [12], filed April 5, 2013, recommending that the Court grant Defendant's motion to dismiss, DE [7], pursuant to Fed. Rule Civ. P. 12(b).

Plaintiff, David Richard Lee, proceeding *pro se*, filed this action against IRS Commissioner Douglas Shulman seeking a refund of his 2004 federal income taxes along with any associated penalties and interest fees. DE [1] The complaint was amended to substitute the United States as defendant instead of Commissioner Shulman. DE [9] Plaintiff did not file a response to defendant's motion to dismiss.

Specifically, the Magistrate Judge recommends that Plaintiff's amended complaint be stricken and Defendant's motion

to dismiss for lack of subject matter jurisdiction and for failure to state a claim be granted. The report recommends dismissal of this matter under Fed. Rules Civ. P. 12(b)(1) and 12(b)(6) because: 1) the United States is immune from suit unless it expressly waives its sovereign immunity which extends to government officers and agencies; 2) the amended complaint was untimely filed without written consent of the Defendant nor with leave of court; 3) leave to amend would have been futile as the claim would not have survived a motion to dismiss; and 4) Plaintiff failed to timely file an administrative claim for the tax refund. Objections to the Report and Recommendation have not been filed and the time for filing such objections has expired under Fed. R. Civ. P. 72(b)(2).

After a *de novo* review of the record and the Magistrate Judge's Report and Recommendation, the Court finds the Report and Recommendation should be adopted in its entirety. As such, the Court concludes the amended complaint should be stricken, the Defendant's motion to dismiss should be granted, accordingly, plaintiff's motion to file a second amended complaint filed on April 19, 2013, DE [13], should be denied and the case **DISMISSED** pursuant to Fed. Rule Civ. P. 12(b).

**IT IS SO ORDERED** this 25<sup>th</sup> day of April, 2013.

**s/John T. Fowlkes, Jr.**  
JOHN T. FOWLKES, JR.  
UNITED STATES DISTRICT JUDGE